

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DONALD RAY HOPPER, SR.
Claimant

VS.

ROBERTS TRUCK CTR.-SALINA, INC.
Respondent

AND

COMMERCE & INDUSTRY INS. CO.
Insurance Carrier

Docket No. 1,031,587

ORDER

Respondent and its insurance carrier request review of the February 21, 2007 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

The claimant suffered a work-related injury and respondent had provided claimant with authorized medical treatment. After a course of treatment the designated treating physician determined claimant had reached maximum medical improvement and released him from treatment. Claimant alleged that he continued to have pain and physical problems. When he sought additional medical treatment from respondent he was told that he had reached maximum medical improvement and his case was closed. Claimant then sought unauthorized treatment with Dr. Michael Estivo who recommended claimant undergo additional diagnostic studies. The claimant provided respondent with a notice of intent requesting authorization for additional medical care or a list of three physicians. Respondent did not agree to the request and the matter proceeded to preliminary hearing.

The Administrative Law Judge (ALJ) determined claimant's need for additional treatment was related to the accidental injury while working for respondent. The ALJ further noted that because respondent failed to provide the requested additional medical treatment that Dr. Estivo would be designated the authorized treating physician as requested by the claimant.

The respondent requests review of whether the ALJ exceeded her authority in designating Dr. Estivo as the authorized treating physician. Respondent argues the notice of intent requested a list of three physicians from which the claimant could choose one. And because the ALJ authorized a specific physician she exceeded her authority.

Claimant argues the respondent's application should be dismissed because this is not an appealable issue pursuant to K.S.A. 44-534a(a)(2). Consequently, the ALJ's Order should remain in full force and effect.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Before the Board can exercise jurisdiction over a preliminary hearing matter the issue must be one of those enumerated in K.S.A. 44-534a(a)(2), or the ALJ must have exceeded her jurisdiction as required by K.S.A. 2006 Supp. 44-551(i)(2)(A). As set forth below, the Board does not have jurisdiction over this matter under either statute.

Respondent and insurance carrier contend the ALJ exceeded her jurisdiction when she designated the authorized treating physician instead of having respondent provide a list of three physicians from which the claimant could choose one. Respondent further argues that a list of three physicians is what claimant had requested in his letter of intent. However, that is not exactly the fact situation in this case.

Claimant's request was in the alternative. The claimant requested authorization for additional medical care or a list of three physicians. At the preliminary hearing the claimant's counsel again stated the issue was authorization for additional medical care or a list of three physicians. Claimant's counsel stated in pertinent part:

THE COURT: Mr Pistotnik, what are your requests for hearing today?

MR. PISTOTNIK: Your Honor, we are requesting authorization for additional medical care or at least a list of three orthopedic or neurological surgeons to evaluate and treat.¹

The claimant was simply requesting designation of an authorized medical provider for additional medical treatment after the initial physician of respondent's choice had released claimant from his care and treatment. And the respondent denied claimant's request for additional medical treatment. As a result, the ALJ had inquired if claimant was

¹ P.H. Trans. at 4.

requesting a specific physician to be designated or a list of three from which to choose the authorized physician.

THE COURT: Mr. Pistotnik, since the respondent is denying additional medical, are you requesting a specific person or just a list of three or what?

MR. PISTOTNIK: Your Honor, in our notice of intent we had requested a list of three. But that was before the claimant had seen Dr. Mike Estivo. Since Dr. Mike Estivo is already familiar with the claimant, we would request that he be the authorized doctor.

THE COURT: Mr. Hobbs, cross examination.

MR. HOBBS: But the seven-day demand letter, though, was for a list of three; is that correct?

MR. PISTOTNIK: Let's see, we requested additional medical care or a list of three.²

Therefore, claimant's request for the appointment of Dr. Estivo is to be treated as a request for medical treatment rather than a request for change of treating physician.

The ALJ's Order in this case does not exceed the ALJ's jurisdiction. K.S.A. 44-534a provides that the ALJ at a preliminary hearing may award medical treatment at respondent's expense. The authority to order medical treatment includes the authority to require that treatment be provided with a specific provider. Although the respondent does, in the first instance, have authority to designate the authorized treating physician, when the respondent does not do so and medical care is ordered as a result of a preliminary hearing, the ALJ may either direct that the respondent choose a physician or, in the alternative, may designate the physician requested by the claimant or from whom claimant has already obtained treatment. This Board Member finds respondent has not raised a jurisdictional issue and this appeal is dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁴

² *Id.* at 11-12.

³ K.S.A. 44-534a.

⁴ K.S.A. 2006 Supp. 44-555c(k).

WHEREFORE, it is the finding of this Board Member that this review is dismissed and the Order of Administrative Law Judge Nelsonna Potts Barnes dated February 21, 2007, remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of April 2007.

BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge